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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-652

NEWT DARNELL,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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TO THE SUPREME COURT OF THE
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Petitioner,Newt Darnell, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in this cause July 3, 1973, and that a hearing on the judgment of conviction be reversed.

## OPINIONS BELOW

The following opinions and decisions of the courts of the State of Washington are set forth in the appendix hereto:

1. Order Denying Petition for Review entered July 3, 1973, under Cause Number 42813.

2. Opinion of the Court of Appeals, State of Washington, Division III, filed April 3, 1973, Washington Appellate 627

3. Opinion of the Superior Court of the State of Washington for Adams County entering

judgment and sentence on verdict of a jury on May 26, 1972, on trial de novo from Justice Court.

4. Decision of the Justice Court, Richland Precinct, Benton County Washington, on the 7th day of October 1971.

## JURISDICTION

The judgment of the Supreme Court of the State of Washington following appeal from the Petitioners conviction, was entered July 3, 1973. The Supreme Court of the State of Washington on July 16, 1973 entered a Notation Order Denying a Motion for a Stay of Execution of Judgment. Petition for a Stay of Execution is being filed with this Petition. The sentence imposed upon Petitioner has not yet been executed. The jurisdiction of this Court is invoked under U.S.C. 1257 (3).

## QUESTIONS PRESENTED

1. Whether the State of Washington consistant with the Fifth and Fourteenth Amendment may convict upon his arrest by State Highway Patrolman for driving violations, and escape from custody under circumstances in which the officer failed to give the petitioner the Miranda warning or any warning and information obtained in the interrogation was used to obtain his conviction.

2. Whether the State of Washington consistant with the Fifth and Fourteenth Amendments may convict upon submitting to the jury an instruction permitting the jury to speculate on the petitioner's being under the influence of narcotic drugs when there was no evidence of his use of such drugs.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV. S.1

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Laws of the State of Washington (1971 1st ex. s. c 284, para. 1; 1967, c 32 para. 68; 1, 1965 ex.s. c 155, para. 62) codified as para. 46.61.515. Revised Code of Washington Annotated.

> 46.61.515 Driving while under the influence of intoxicating liquor or drugs. Penalties..

> every person who is convicted of violation of (A) driving a motor vehicle while under the influence of intoxicating liquor or (B) driving a motor vehicle while under the influence of narcotic drugs, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle, shall be punished by imprisonment for not less than 5 days nor more than 1 year and by a fine of not less than $50.00 nor more that $500.00.....

## STATEMENT OF THE CASE

1. The Arrest. At approximately 10:30 p.m. on September 23, 1970, Petitioner was observed driving by a State Trooper in a manner that aroused the Trooper's suspicions. Specifically, the Trooper contended that the vehicle was being driven too slowly and weaving over the center line. The Trooper stopped the Petitioner, left his vehicle, and began questioning the Petitioner while Petitioner remained seated in his vehicle. (TR. 9,10, 12) The Trooper asked Petitioner to produce his driver's license. Petitioner informed the Trooper that he did not have a Washington driver's license on his person. (TR.12) After more questioning, the Petitioner was asked to get out of his vehicle which he did and the questioning continued. Petitioner was requested to perform routine field sobriety tests. He cooperated with these requests. Petitioner was subsequently taken by the Trooper to the patrol car and informed that he was under arrest for driving while under the influence of alcohol. (TR 13,33) During the period of time that Petitioner was seated in the patrol vehicle, he was subjected to further interrogation by the Trooper. (TR. 72) Petitioner was charged with driving while under the influence of intoxicating liquor, driving while license suspended, and escaping from the custody of an officer.

2. Justice Court Proceedings. After the suc-

cessful filing by Petitioner of a Motion and Affidavit for a change of venue, trial of the above charges was had on October 6, 1971 in the Justice Court, Richland Precinct, Benton County, Washington. Petitioner's motion and affidavit to quash service of warrant of arrest and motion for dismissal had been previously denied. The Petitioner was found guilty of the charge of driving under the influence of intoxicating liquor, driving while license suspended, and escape from custody of a police officer. He was assessed a $500 fine on each count for a total fine of $1,500. Petitioner was also given a six months jail sentence on each charge to run consecutively for a total of 18 months.

3. Superior Court Proceedings. Petitioner appealed his Justice Court conviction to the Superior Court for Benton County, the State court of general trial jurisdiction. Petitioner filed a timely Notice of Appeal on October 13, 1971, together with an appeal bond in the sum of $500. Pursuant to Petitioner's motion and affidavit for change of venue, an order granting a change of venue from Benton County to Adams County was entered February 3, 1972 by James J. Lawless, Judge of the Benton-Franklin County Superior Courts. In the Adams County Superior Court, the case was tried denovo commencing May 9, 1972, before a jury of six.

The prosecution called the State Trooper who had stopped Petitioner's vehicle and taken Petitioner into custody. The Trooper testified that he approached Petitioner's vehicle and requested his driver's license, further testifying that Petitioner admitted not having a valid operator's license in his possession. (TR. 12) The Trooper further testified that he questioned Petitioner concerning a suspected consumption of intoxicants. This line of questioning continued during the administration of the field sobriety tests outside

of Petitioner's vehicle. Petitioner was also questioned as to the status of his driver's license. (TR. 13) The Trooper testified that he requested Petitioner to place himself inside the patrol car and that after Petitioner had done so, the Trooper informed him that he was under arrest for driving while under the influence of intoxicating liquor. (TR. 13, 14)

On cross examination, the Trooper admitted that at no time during the course of the events set forth herein did he advise the Petitioner of his right to remain silent, or that anything he might say might later be used against him in a court of law, of of Petitioner's right to counsel during interrogation. (TR. 36)

The testimony of the State Trooper formed the nucleus and substance of the prosecution's case against Petitioner. Petitioner's motion for dismissal of charges at the conclusion of testimony was denied by the trial court. (TR. 81, 82, 83)

The jury returned a verdict of guilty on May 9, 1972 of the crime of (1) operating a motor vehicle while under the influence of intoxicating liquor, (2) driving while license suspended, and (3) escape from custody of an officer. Judgment and sentence on said verdict was rendered by the trial judge on May 26, 1972. On the charge of operating a motor vehicle while under the influence of intoxicating liquor Petitioner was fined $500 plus court costs of $113 and sentenced to an additional 90 day confinement for the crime of driving while license suspended. On the crime of escape from custody, Petitioner was punished by a fine of $250.

4. State Appellate Court Proceedings. Petitioner appealed his conviction to the Court of Appeals of Washington, Divisoin III, which received briefs and heard argument thereon. On April 3, 1973, the Court filed its opinion affirming the conviction.

The Court found "harmless error" in the improper admission into evidence of the Petitioner's out of court statements holding that they were merely repetitive of other admissable out of court statements. The Court also held that the giving of an improper jury instruction was also "harmless error."

Petitioner filed a timely petition to the Supreme Court of Washington for review of the decision of the Court of Appeals in this cause. Said petition for review was denied by Order dated July 3, 1973. Pending the submission of this Petition for Certiorari, Petitioner filed a motion in the State Court for a stay of execution of sentence until a ruling from this court could be obtained. That motion was denied by the Supreme Court of the State of Washington on July 16, 1973. Petitioner further applied to this Court for a stay of execution which application was denied August 3, 1973 by Order signed by Associate Justice Douglas. The sentence imposed upon Petitioner has not yet been executed.

## QUESTIONS RAISED BELOW

The following is a summary of the proceedings in the court below relating to the time and manner in which the questions presented were raised and the State court's rulings thereon.

1. (a) Petitioner entered pleas of not guilty to the criminal complaint charging him with violating sections 46.61.506 and 46.20.342, Revised Code of Washington.
   (b) On October 6, 1971, a trial on the merits was held in Justice Court. The Justice Court found Petitioner guilty of the crime charged.
   (c) In October, 1971, Petitioner filed a Notice of Appeal to the Superior Court of the State of WAshington for Benton County from the judgment and sentence made

and entered in said Justice Court on the 6th of October, 1971.

(d) During the course of Petitioner's Superior Court trial, his counsel repeatedly raised objections to the failure on the part of the arresting officer to give Petitioner the required Miranda warnings. (TR. 44, 45, 45, 47) Petitioner's counsel further urged that if a valid arrest of Petitioner had occurred, then Petitioner was subject to custodial interrogation, the basic Miranda warnings. (TR. 33, 34, 35, 36) The trial court erroneously indicated that the rules pertaining to custodial interrogation did not apply to the fact pattern at hand. (TR. 35)

(e) At the close of the prosecution's case, Petitioner made a Motion for Dismissal on the ground that there hadn't been a valid arrest and that the failure of the Trooper to give Petitioner his Miranda warnings when Petitioner was in custody in the patrol car, amounted to a clear violation of Petitioner's constitutional rights. (TR. 44, 45)

(f) After both sides had rested, the Petitioner vigorously objected to proposed instruction No. 3 which read in pertinent part "It is unlawful for any person who is under the influence of or affected by the use of intoxicating liquor or of any narcotic drug to drive or be in actual physical control of a vehicle within this state." (TR. 89) The Petitioner accepted to the giving of the above instruction on the ground that there was no showing that any narcotic drug had been involved in the case and that said instruction would be prejudicial to the Petitioner in view of its affect on the jurors. The objectionable instruction was given by the court.

(g) On May 26, 1972, the Superior Court entered its findings, conclusions, and judgment adjudicating Petitioner to be guilty of all charges and in effect rejecting his contentions made before and during trial.

(h) In May, 1972, Petitioner filed a Notice of Appeal to the Court of Appeals of Washington from the judgment entered in the Superior Court for Adams County in May, 1972.

(i) In his brief to the Court of Appeals, Division III, Petitioner assigned error to the admission of testimony of the State Trooper consisting of statements made by the Petitioner related to the amount of alcohol Petitioner had consumed on the evening he was stopped. (TR. 12, 13) Petitioner further assigned error to the giving of instruction No. 3.

(j) In his brief to the State Supreme Court, Petitioner raised the following points:

(1) Petitioner, as pointed out by the appellate court, could have been cited immediately after he was stopped for failure to produce a driver's license or for his erratic driving. The statements challenged by Petitioner were made after the Trooper was aware of these violations.

(2) When considered in light of applicable authority, the appellate court erred in concluding that the temporary detention of Petitioner did not constitute an in-custody interrogation necessitating the Miranda warnings.

(3) The charges brought against Petitioner subsequent to his arrest were not for a completely unrelated crime, but were for the specific traffic violations observed by the arresting of-

ficer prior to and at the time of stopping Petitioner's vehicle. Thus, the holding in State v. Gray 3, Wn. App. 146, 473 Pac. 2d, 189 (1970) should be applied.

(4) That the authority cited by the appellate court did not support its conclusion and that the Miranda Warnings were not given in a timely manner and further that both statements at issue were clearly inadmissable and in view of their cummulative impact upon the jury, should have been deemed prejudicial error.

(5) The objectionable jury instruction represented the wrongful use of a violation term which might well have inflamed, misled, or prejudiced the jury.

(k) The Supreme Court of the State of Washington by Order dated July 3, 1973, affirmed Petitioner's conviction and sentence.

## REASONS FOR GRANTING THE WRIT

This case raises significant questions concerning the proper scope and application of constitutional rights secured by the 5th and 14th Amendments and specifically, the practical question of the proper characterization of the nature of the detention of Petitioner and a determination of the necessity of Miranda warnings pursuant to such characterization.

## AUTHORITY

The Court of Appeals in its decision correctly noted that statements made by a defendant during a custodial interrogation may not be introduced into evidence at a trial unless the interrogation was preceded by proper Miranda warnings. Miranda

v. Arizona, 384 U.S. 436, 16 L.ED. 2d 694, 86 Sup. Ct., 1602 (1966) The Court also correctly observed that even exculpatory statements are to be excluded unless preceded by proper Miranda warnings. State v. Woods 3 Wn. App. 691, 477 Pac. 2d, 182, (1970) The Appellate Court sought to resolve the issue of whether Petitioner was placed in custody by the Trooper or otherwise deprived of his freedom of action in any significant way at the time the statements were elicited. The Court proceeded to state that Petitioner could have been cited immediately after he was stopped for failure to produce a driver's license or for his erratic driving. It is not disputed that the challenged statements were made after the Trooper was aware of these violations, but the appellate concluded that "this temporary detention for traffic violations, however, is not synonymous with the in-custody interrogation necessitating Miranda warnings". The Court cited State v. Gray,Supra,in support of this conclusion. A careful reading of the holding of the Court in State v. Gray reveals that the decision, not only fails to support the conclusion, but rather, offers grounds for its refutation.

In Gray, police officers stopped a suspect for observed traffic violations as in the instant cause. The officers were aware of the violations and could have forthwith cited the suspect for them. The officers had no probable cause, however, to believe that the suspect had commited an unrelated and more serious offense at the time of the questioning during temporary detention. The court in Gray expressly noted that "Gray does not contend that being stopped in his car and questioned regarding the traffic offenses amounted to custodial interrogation" ib id. page 148. The court held that the warnings provided for in Miranda v. Arizona, Supra, must be given if the prosecution wished to use statements "either exculpatory or inculpatory stemming from custodial interrogation of defendants" ib id. page 148. General on the scene questioning as to facts sur-

rounding a crime or other general questioning of citizens in the fact finding process does not, the court observed, amount to custodial interrogation. Miranda v. Arizona, Supra. at 477.

State v. Creach 77 Wash. 2d 194, 461 Pac. 2d,329 (1969) was cited by the court in Gray as defining the precise point at which investigation shifts to custodial interrogation. The court in State v. Creach held "it is difficult to set forth an all-inclusive rule covering every possible situation, but once an investigation officer has probable cause to believe that the person confronted has committed an offense, the officer cannot be expected to permit the suspect to leave his presence. At that point, interrogation becomes custodial and the suspect must be warned of his rights."

In Gray, the court declared that the status of custodial interrogation began when, after answering some routine questions, Gray gave the officers probable cause to believe that he had committed a burglary. Thus, the charge later brought against Gray did not involve the observed traffic offenses. The Court further noted that "Gray does not argue his statements were inadmissable in a prosecution of a traffic offense." ib id. page 149. Thus, the specific issue raised by Petitioner was not confronted by the Court in State v. Gray, Supra.

The charges later brought against Petitioner were not for completely unrelated crimes, but were for the specific traffic violations observed by the arresting officer prior to and at the time of stopping Petitioner's vehicle. The Court in Gray held "questioning during temporary detention for a traffic offense occurring prior to the point when the investigation of an unrelated and more serious offense has shifted from the investigation in so far as the more serious crime is concerned." ib id. page 146. We are not, in the in-

stant case, concerned with more serious unrelated crimes. We are concerned with the observed traffic offenses for which Petitioner was charged.

Petitioner was definitely in the custody of the arresting officer and certainly deprived of his freedom of action. As the Trooper testified, Petitioner was informed that he was under arrest. From the time Petitioner's vehicle was stopped, routine investigatory questions eliciting statements concerning unrelated crimes would arguably have been admissable, but Petitioner's statements concerned the specific offenses with which he was later charged; offenses within the knowledge of the officer at the time of the questioning. Thus, this questioning cannot justly be deemed a mere investigatory interrogation.

The appellate court also relied upon State v. Crowd, 7 Wn. App. 211, 498 Pac. 2d 907 (1972). In Crowd, we find a routine police investigation of a homicide. The police did not witness the crime. The officers found upon their arrival two individuals present at the scene. Thus, the initial interrogation in Crowd could not have focused on one or both of the two individuals present until information giving rise to suspicion or probable cause was elicited by the officers. At the time the Trooper first approached Petitioner's vehicle and requested Petitioner's driver's license, he, by the Petitioner's responses and the Trooper's own observation, had "reasonable grounds for suspicion supported by circumstances within the knowledge of the arresting officer to warn a cautious man into believing that the accused was guilty of a crime." State v. Parker 79 Wn.2d 326, 485 Pac.2d 60 (1970).

Thus, the investigatory interrogation in State v. Crowd was conducted under circumstances which did not give rise to a reasonable belief on the part of the officers that the accused had committed a crime. No admissions had been made prior to the

commencement of the investigatory interrogation. As stated, the officers had witnessed no violations of law. The circumstances in the instant case are decidedly different. The authority cited by the appellate court does not support its conclusions.

The appellate court felt that the investigation did not focus on Petitioner specifically for the offenses charged until Petitioner was requested by the officer to leave his vehicle and perform certain physical tests. The court has in mind the charge of driving while under the influence of intoxicating liquor, but it must also be remembered that Petitioner was also charged with the offenses of driving while license suspended and escaping from the custody of an officer. The court is inconsistent in its analysis. As stated, Petitioner was observed by the Trooper allegedly driving his vehicle at an exceedingly slow speed and crossing the center line. Acting upon these observations, the Trooper stopped the Petitioner's vehicle. In response to a specific inquiry from the officer, the Petitioner admitted having no valid operator's license on his person. The prosecution contended that this inquiry was part of a routine investigation. However, an investigation cannot be "routine" when there is probable cause for arrest. As stated by Court in State v. Crowd, "questions asked of a person are part of a routine investigation of an incident when prior to such time as there is probable cause for arrest, ie. a reasonable ground supported by known circumstances to warn a cautious man in believing that the person being questioned was guilty of a crime." State v.Crowd, Supra. page 211. The officer certainly had probable cause from his own observation and the Petitioner's initial responses to his questions to believe that the Petitioner was guilty or probably guilty of a variety of traffic offenses.

The Appellate Court held that the statements elicited from Petitioner during the physical sobriety

tests were subject to the Miranda warnings. "Once the Miranda warning was given, defendant would know he could refrain from making any statements while performing the tests." Thus, the Appellate held that the statements made during the course of said physical tests should have been held inadmissable by the trial court. However, the Appellate Court held that the statements made during the tests were repetitive of other statements made during the tests, were repetitive of other statements made by Petitioner while he was seated in his vehicle and that they added nothing to the information Petitioner had previously given the Trooper. Clearly, the Court's attitude toward the inadmissable statements is colored by the fact that they were exculpatory. Yet, no distinction is to be made between exculpatory and inculpatory statements. Both are subject to the same constitutional principles, authority, and analysis in determing their admissibility.

As authority for its conclusion that the wrongful admission of Petitioner's statements was harmless error, the Appellate Court cited State v. Slack, 3 Wn. App. 116, 472 Pac. 2d 541 (1970). In Slack, certain statements made by defendant while in custody were held inadmissable because defendant was not advised that he had a right to counsel prior to interrogation. The Court felt that the statement in question was repetitive of prior statements and added nothing to the information which defendant had previously given to the police and the Court held "we are satisfied from a review of the entire record that its admission did not affect the result of the trial and was harmless error beyond a reasonable doubt." ib id. page 118. The Appellate Court held as follows: "Our review of the record satisfies us that the admission of the second statement was harmless error." The court plainly did not utilize the proper criteria in reaching this conclusion. It did not state that it was satisfied that the wrong-

ful admission of Petitioner's statements was harmless "beyond a reasonable doubt". This was in clear violation to the applicable authority and amounts to an unconscionable dilution of Petitioner's constitutional protections.

In People v. Ceccone 260 Cal. App. 2d 886, 67 Cal. Rep. 499 (1968), two police officers stopped the driver of a vehicle for failing to stop for a red light, questioned the driver as to whether he had an operator's license or registration, whether the driver owned the car, and whether the driver had taken drugs were held to have subjected the driver to "custodial interrogation" requiring Miranda warnings. The Court found that the defendant driver's inability to produce either an operator's license or a vehicle registration, his conflicting statements and his general condition had been sufficient to give the officers probable cause to believe that a crime or crimes had been committed.

In the instant case, the Miranda warnings were clearly not given in a timely manner. In fact, the warnings were not given at all. Thus, Petitioner's statements made after the officer became aware that Petitioner had no valid operator's license on his person, were clearly inadmissable and should have been excluded by the trial court. They should be deemed prejudicial. The potential cummulative impact of these statements upon the jury mitigates strongly against their being deemed harmless error.

The Appellate Court also noted that the giving of the objectionable jury instruction previously referred to was "harmless error". Reference to the term "narcotic drug" in instruction No. 3 was improper but the Court then proceeded to state that the giving of this instruction did not amount to a prejudicial error. In State v. Odom, 8 Wn. App. 180, 188, Pac. 2d, it was held that "when

the record discloses an error in an instruction given on behalf of the parties in whose favor the verdict was returned, the error is presumed to have been prejudicial and to furnish ground for reversal unless it affirmatively appears that it was harmless." ib id. The Court in its decision cited no authority in minimizing the impact of this prejudicial instruction. The Court refers to the offensive instruction as "a merely informational instruction." Informational or not, wrongful use of the volatile term "narcotic drug" certainly provides a sound basis upon which to conclude that the jury might well have been inflamed, misled,or prejudiced by the erroneous instruction. Clearly, the proper presumption in favor of the Petitioner herein was not applied. A further dilution of his constitutional safeguards.

## CONCLUSIONS

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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TRANSCRIPT OF JUDGMENT

A Transcript of Judgment signed by Judge Albert Yencopal, Justice of the Peace, Richland Precinct, Benton County, Washington, on October 20, 1971.

That on September 23, 1970, defendant was charged with driving while under the influence of or affected by the use of alcoholic beverage or drugs, driving while driver's license suspended and escape from custody of a police officer. Bail was set at $930.00, which defendant posted and was released from custody.

On October 12, 1970, defendant filed an affidavit for Change of Venue, to be transferred out of the court of Judge Robert S. Day, Kennewick Justice Court.

The trial was scheduled for March 5, 1971, in the Court of Judge Kenneth Serier, at which time defendant filed Motion and Affidavit to Quash Service of Warrant of Arrest; and on March 29, 1971, defendant filed Demand for Jury.

On July 19, 1971, defendant filed Motion and Affidavit for Change of Venue to Richland Justice Court, which was granted on July 26, 1971. The case was received by said Richland Court on July 30, 1971.

The case was set for trial on October 6, 1971.

Defendant filed a Motion to Dismiss, and arguments thereon were scheduled immediately prior to the trial time on October 6, 1971. The motion to dismiss was denied, and the matter went on for trial. The plaintiff was represented by the Benton County Prosecutor and defendant was personally present and represented by his attorney, Charles Morbeck.

The defendant was found guilty of the charge of driving under the influence of alcoholic beverage, driving while license suspended, and escape from custody of a police officer. He was assessed a $500.00 fine on each count, for a total fine of $1,500.00. In addition, he was given a six months jail sentence on each charge, to run consecutively, for a total of 18 months.

On October 13, 1971, defendant timely filed a Notice of Appeal, together with an appeal bond in the sum of $500.00.

## JUDGMENT AND SENTENCE

The following judgment and sentence was signed by Judge Gordon Swyter of the Adams County Superior Court, State of Washington, on May 26, 1972. The text of the Judgment and Sentence follows:

The Deputy Prosecuting Attorney for Benton County, Curtis Ludwig, the Defendant and his counsel, Charles T. Morbeck, being present in Court, the Defendant having been found Guilty of the offenses of (1) Operating a Vehicle While Under the Influence of Intoxicating Liquor, (2) Driving While License Suspended, and (3) Escape from Custody of an Officer, in the Justice Court, Richland Precinct, Benton County, Washington, and sentenced by that Court, and having appealed from said Judgment and Sentence to the Superior Court for Benton County, and an Order having been entered changing the venue to Adams County, and the appeal being heard denovo by a jury in the Superior Court of Adams County, which jury returned a verdict of Guilty on the 9th day of May, 1972, of the crimes of (1) Operating a Motor Vehicle While Under the Influence of Intoxicating Liquor, (2) Driving While License Suspended, and (3) Escape from Custody of an Officer, NOW, THEREFORE,

IT IS ORDERED, by the Court that the said Defendant, NEWT DARNELL, is Guilty of the crime of Operating a Motor Vehicle While Under the Influence of Intoxicating Liquor, and that he be punished by a fine of $500.00 and court costs in the sum of $113.00, and by confinement in the Benton County Jail for a period of 90 days to commence May 30, 1972,

IT IS FURTHER ORDERED by the Court that said Defendant, NEWT DARNELL, is Guilty of the crime of Driving While License Suspended, and that he be punished by confinement in the Benton County Jail for a period of 90 days, said sentence to run consecutively.

IT IS FURTHER ORDERED by the Court that the said Defendant, NEWT DARNELL, is Guilty of the crime of Escape from Custody of an Officer, and that he be punished by a fine of $250.00.

## THE OPINION OF THE COURT OF APPEALS

The opinion of the Washington State Court of Appeals, Division III, was filed April 3, 1973. The text of that order was as follows:

"MUNSON, J.—Defendant, Newt Darnell, appeals from judgment and sentence upon a jury verdict for driving while under the influence of intoxicating liquor (RCW 46.61.506), and driving while license suspended (RCW 46.20.342).

On September 23, 1970, at approximately 10:30 p.m., defendant was stopped by a state trooper. The trooper observed the vehicle being driven too slowly and weaving over the center line. Defendant could not produce a valid driver's license and, according to the trooper's testimony, appeared very intoxicated. He was asked to step out of his car and take physical sobriety tests. At the conclusion of these tests, he was taken to the patrol car and informed he was under arrest for driving while under the influence of alcohol. The trooper told defendant to stay in the patrol car; nevertheless, he got out of the car and fled the scene of arrest.

During trial the trooper related statements made by defendant on the night of the arrest. These statements, which were made pursuant to questions asked by the trooper, indicated defendant had not consumed any alcohol that evening. Defendant now contends the admission of these statements was prejudicial error because the statements were related at a time when he was subjected to a custodial interrogation, not preceded by required Miranda warnings.

Statements made by a defendant during a custodial interrogation may not be introduced into evidence at trial unless the interrogation was

preceded by proper Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974 (1966). Even exculpatory statements, such as those made by defendant in the instant case, are to be excluded unless preceded by proper Miranda warnings. State v. Woods, 3 Wn. App. 691, 695, 477 P.2d 182 (1970); State v. Nuckols, 1 Wn. App. 189, 191, 459 P.2d 979 (1969).

The primary question here, however, is whether defendant was in custody, or otherwise deprived of his freedom of action in any significant way, at the time the statements were elicited.

Defendant could have been cited immediately after he was stopped for failure to produce a driver's license or for his erratic driving. The statements challenged by defendant were made after the trooper was aware of these violations. This temporary detention for traffic violations, however, is not synonymous with the in-custody interrogation necessitating Miranda warnings. State v. Gray, 3 Wn. App. 146, 149, 473 P2d 189 (1970). The existence of adequate grounds to arrest or give a citation for minor traffic violations does not necessarily present a situation of compulsive in-custody interrogation or deprivation of freedom necessitating Miranda warnings. The facts in the instant case evidence no such compulsive interrogation situation.

Both statements admitted into evidence at trial were elicited before defendant was formally arrested. The first statement was elicited upon the trooper going to defendant's car. The trooper asked for defendant's driver's license and was advised it was at defendant's home. The trooper then testified the vehicle evidenced a strong odor of alcohol; he asked defendant how much he had had to drink. Defendant replied

"none". The trooper then asked if the defendant would be willing to alight from the vehicle and perform physical sobriety tests. Up to the time the trooper asked defendant if he would get out of his vehicle, the trooper was merely conducting an investigatory interrogation. The inquiries were not yet to the status contemplated by Miranda. State v. Cloud, 7 Wn. App. 211, 498 P.2d 907 (1972), and cases cited therein. We find no constitutional error in admitting this exculpatory statement.

The second statement apparently was made while the physical sobriety tests were being conducted. Once the trooper had stopped the vehicle for traveling at an exceedingly slow speed and crossing the center line, had sensed the strong odor of alcohol in defendant's vehicle, and observed defendant's physical condition, he desired to further confirm his suspicions by physical tests. It was at that point that the investigation focused on defendant specifically for the crime charged. Once the trooper's reasoning brought him to request these tests, Miranda applied, not to the tests about to be performed, but to any statements defendant might make during the giving of such tests. Once the Miranda warning was given, defendant would know he could refrain from making any statements while performing the tests.

However, the second statement was repetitive of the first, and added nothing to the information defendant had previously given the trooper. We note defendant did not object to the admission of either statement being received in evidence. Further, he testified in his own behalf, denying that he had anything to drink prior to being stopped by the trooper. Our review of the record satisfies us that the admission of the second statement was harmless error. State v. Martin, 73 Wn. 2d 616, 400 P. 2d 429 (1968);

State v. Slack, 3 Wn. App. 116, 118 472 P.2d 541 (1970).

Defendant also challenges his conviction for operating a motor vehicle while license suspended. He first assigns error to the giving of instruction 7[1] which defined the elements of this misdemeanor.

Defendant contends that actual notice to the accused of his suspension is a necessary element of this misdemeanor and that failure to instruct thereon was prejudicial error. He contends that his proposed instruction to that effect should have been given. We disagree.

The state is authorized to revoke or suspend driving privileges upon the occurrence of specific events. RCW 46.20.285, .291, .292, .300. The procedure for invoking these sanctions is set forth by statute and provides for

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[1]Instruction 7 states:

"You are instructed that before you can find the defendant guilty of the offense of driving while license suspended as charged in the complaint, it is necessary that you find from the evidence, beyond a reasonable doubt, each of the following elements:

"1. That on or about the 23rd day of September, 1970, the defendant was operating a motor vehicle upon the public highways of the State of Washington.

"2. That at that date and time the defendant's driver's license was suspended.

"3. That said act occured (sic) in Benton County, Washington.

"If you are satisfied that the State of Washington has proven the truth of each of the foregoing elements, beyond a reasonable doubt,

notice, hearing and appeal. RCW 46.20.332-.335. The statute upon which this charge is based, RCW 46.20.342, states in part:

> (1) Any person who drives a motor vehicle on any public highway of this state at a time when his privilege so to do is suspended or revoked or when his policy of insurance or bond, when required under this chapter, shall have been canceled or terminated, shall be guilty of a misdemeanor.

We do not believe the legislature intended to require evidence of actual notice of a revocation or suspension as an element of this crime. State v. Mantell, 71 Wn. 2d 768, 430 P.2d 980 (1967); State v. Boggs, 57 Wn. 2d 484, 358 P.2d 124 (1961); State v. Henker, 50 Wn. 2d 809, 314 P.2d 645 (1957). We find no error in failing to instruct upon actual notice.[1]

Defendant finally contends the giving of instruction 3 was error. That instruction states:

> The Statute upon which the offense of driving while under the influence of intoxicating liquor is based and under which the prosecution is brought provides as follows:
> "46.61.506 Persons under the influence of intoxicating liquor.
> (1) It is unlawful for any person who is under the influence of or affected by the use of intoxicating liquor or of any narcotic drug to drive or be in actual physical control of a vehicle within this state."

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[1] you will find the defendant guilty of the offense of driving while license suspended. If you find a reasonable doubt as to any of such elements, you will find the defendant not guilty."

(Italics ours.) No evidence of drug use was presented at trial; as a consequence, defendant contends reference to "narcotic drug" in the above instruction was prejudicial error.

Reference to the term "narcotic drug" in the instruction was improper. Defendant was not charged with driving a motor vehicle while under the influence of drugs and no evidence with respect to drug use was presented. State v. Johnson, 1 Wn. App. 553, 555, 463 P.2d 205 (1969). Nevertheless, the giving of this instruction did not amount to prejudicial error. Another instruction clearly defined the crime with which defendant was charged, setting out its necessary elements. That instruction made no reference to "narcotic drug" or in any way indicated drug use to be an issue in the case. It was merely an informational instruction setting out the statute under which defendant was charged. Under these circumstances, there is no basis upon which to conclude the jury was misled by that instruction into speculating that the prosecution was presenting influence of drugs as a theory of this case. From a review of the record, we are convinced that the error in giving instruction 3 was harmless and not prejudicial to the substantial rights of defendant. See State v. Johnson, supra.

Judgment is affirmed.

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[1] The state showed that notice of revocation had been sent to defendant. Defendant presented no evidence indicating he did not receive the notice. He failed to display his license when stopped by the police officer. Furthermore, when he took the stand in his own behalf, he presented no testimony indicating he had not received notice of revocation.

ORDER DENYING THE PETITION OF REHEARING

An Order Denying the Petition for Rehearing was entered by the Appellate Court, Division III, on April 30, 1973. The text of that Order was as follows:

The Court having considered the Appellate's petition for rehearing and being of the opinion that it should be denied,

IT IS ORDERED, that the petition be and it is hereby denied.

ORDER DENYING PETITION FOR REVIEW

The Order of the Supreme Court of Washington denying Petitioner Darnell's Petition for Review was entered and filed July 3, 1973. The text of that order was as follows:

The Court having considered the petition for review of the decision of the Court of Appeals in this case,

IT IS ORDERED that the petition be and it is hereby denied.

DATED AND DONE this 11th day of October,1973.

Respectfully submitted,

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